

1-2003

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### Recommended Citation

Claire Kennedy-Wilkins, *Playing Ostrich with the FAA's History: The Scope of Mandatory Arbitration of Employment Contracts*, 54 HASTINGS L.J. 1593 (2003).

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# Playing Ostrich with the FAA's History: The Scope of Mandatory Arbitration of Employment Contracts

by

CLAIRE KENNEDY-WILKINS\*

## Introduction

During the past decade, the use of arbitration in individual employment contracts has risen dramatically.<sup>1</sup> Due to concerns that arbitration does not provide employees with the same protections that they are afforded in court, the increased use of mandatory arbitration clauses in employment contracts has become a cause of concern for many.<sup>2</sup> Recently, a great deal of the controversy has centered on the issue of whether federal law even recognizes mandatory arbitration of employment contracts.<sup>3</sup>

In 1925, Congress passed the Federal Arbitration Act (the "FAA").<sup>4</sup> The FAA was a major piece of legislation recognizing arbitration agreements as "valid, irrevocable, and enforceable."<sup>5</sup> Section 1 of the FAA states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any class of workers engaged in foreign or interstate commerce."<sup>6</sup>

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\* J.D., University of California, Hastings College of the Law, 2003. I would like to thank Professor Reuel E. Schiller for his assistance.

1. Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 643 (2001).

2. See, e.g., Julian J. Moore, *Arbitral Review (or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572 (2000).

3. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). At least as a practical legal matter, this dispute was settled by the Court's decision in *Circuit City*.

4. United States Arbitration Act, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2000)). As originally codified, the Act was called the United States Arbitration Act. Today the Act is uniformly referred to as the Federal Arbitration Act. This Note will only refer to the Act as the FAA.

5. 9 U.S.C. § 2 (2000).

6. *Id.* § 1.

The precise scope of the Section 1 exemption has been the subject of a great deal of debate, most notably in the recent Supreme Court decision in *Circuit City Stores, Inc. v. Adams*.<sup>7</sup>

The modern interpretation of the Section 1 exception is so narrow that it covers *only* seamen, railroad, and other transportation employees.<sup>8</sup> From the Court's decision in *Circuit City*, it is clear that the narrow reading of the exception has won out in the courts. Despite this decision, sufficient recognition has not been given to the meaning of the Section 1 exemption—as it was intended at the time it was enacted. Neither has the Supreme Court provided an alternative explanation for a narrow reading of section 1 if such a construction is inconsistent with the original meaning of the exemption.

Indeed, the Court in *Circuit City* based its decision on a textual analysis of Section 1 and found it unnecessary to consider the history behind the exemption.<sup>9</sup> In dicta, the Court engaged in a cursory discussion of the legislative history in response to the plaintiff's arguments for a broader reading of the exemption.<sup>10</sup> However, the Court did not engage in a detailed analysis of the legislative intent or thoroughly consider the context of the law's enactment.<sup>11</sup> Rather, the Court stated that “[i]t would be unwieldy for Congress, for the Court, and for litigants to be required to deconstruct statutory commerce clause phrases depending on the year of a particular statutory enactment.”<sup>12</sup> This position is inconsistent with the stance that the Court has taken in other circumstances, where the Court has at times gone to great lengths to deconstruct statutory language to give effect to the text's original meaning, and has not found the task overly taxing.<sup>13</sup>

Given the Court's expertise in such matters, it hardly seems that a thorough examination of the FAA's original meaning would prove

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7. 532 U.S. at 105.

8. *Id.* at 109 (holding that the exception in Section 1 only applies to “contracts of employment of transportation workers”).

9. *Id.* at 119.

10. *Id.* at 119–20.

11. *Id.* at 119–21.

12. *Id.* at 118.

13. See *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272–76 (1994). In *Greenwich Collieries*, the Court devoted five pages of its opinion to defining the term “burden of proof” in the year the Administrative Procedure Act was enacted. *Id.* at 271–76. As the Court explained, since the term was not defined in the text of the statute, their “task is to construe it in accord with its—ordinary or natural meaning.” *Id.* at 272. However, the Court recognized that “the meaning of words may change over time, and many words have several meanings even at a fixed point in time” and thus found it necessary to ascertain the “ordinary meaning” of the term in the year of the statute's enactment. *Id.* The Court went to great lengths to carry out this task, consulting a substantial body of contemporary case law, as well as numerous treatises. *Id.* at 272–76.

so “unwieldy” as to prevent the Court from engaging in this analysis. Furthermore, the current widespread use of mandatory arbitration clauses in individual employment contracts, and its effect on the American workforce, makes it important to examine carefully the originally intended scope of the Section 1 exemption. A thorough examination of the exemption’s originally intended scope is important for the added purpose of setting the record straight as a historical matter. This Note argues that, as it was conceived of in 1925, the exemption in Section 1 of the FAA excluded all employment contracts from the scope of mandatory arbitration.

Part I of this Note lays out the historical context in which the FAA emerged. This includes a discussion of the emergence of arbitration in the United States and the history of the Act’s drafting and enactment. Part II engages in an analysis of the Act’s scope, as it was originally intended. This includes a textual analysis exploring the meaning of the term “engaged in commerce” in 1925, as well as the significance of this meaning. This section also examines the intended scope of the Act through a look at its legislative history. Finally, Part II examines how the public perceived the Act at the time it was enacted. Part III proposes a solution to the conflict between the Act’s original intent and its modern interpretation.

## **I. Background of the Federal Arbitration Act’s Enactment**

### **A. The Emergence of Arbitration in the United States**

At common law, arbitration agreements were not specifically enforceable.<sup>14</sup> As a result, such agreements were often disregarded by the parties to them, and arbitration had a limited effectiveness as a method of dispute resolution.<sup>15</sup> While England passed a law in 1854 that made arbitration agreements enforceable, no such legislation was passed in the United States until the 1920s.<sup>16</sup> In the United States, New York led the movement to reform arbitration law by enacting a statute in 1920 that provided for the specific enforcement of arbitration agreements.<sup>17</sup>

Even before arbitration gained acceptance by American courts, merchants used arbitration as a swift and affordable means of resolving business disputes.<sup>18</sup> Indeed, while arbitration is now

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14. Wharton Poor, *Arbitration Under the Federal Statute*, 36 YALE L.J. 667, 667 (1927).

15. *Id.*

16. *Id.*

17. *Id.*

18. Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 144–45 (2002).

commonly associated with labor disputes, commercial arbitration was the first form of arbitration used in the United States.<sup>19</sup> Accordingly, the arbitration reform movement was led by business and trade associations seeking to improve the effectiveness of the dispute resolution mechanism by making agreements to arbitrate enforceable in court.<sup>20</sup> It was not until well after the FAA's enactment that arbitration actually began to be used as a means of resolving labor disputes.

## **B. The Drafting and Enactment of the Section 1 Exemption**

In 1921, just after New York enacted its arbitration act, the American Bar Association (the "ABA") passed a resolution directing its Committee on Commerce, Trade and Commercial Law to "consider . . . the further extension of the principle of commercial arbitration."<sup>21</sup> The following year, the Committee reported its conclusion that "the administration of justice can be advanced first by having Federal Statutes and Uniform State Statutes on the subject of arbitration enacted."<sup>22</sup> More specifically, the Committee announced that it held a public meeting and "perfected a state act upon arbitration, and recommended that it be adopted by this Association."<sup>23</sup> The Committee had actually drafted two acts—the Uniform State Act on Arbitration and a federal act referred to as the Arbitration of Disputes in Admiralty and Interstate and Foreign Commerce.<sup>24</sup> Both acts were very similar to the recently enacted New York law and neither contained an exception for employment contracts.<sup>25</sup>

The following year, the Committee on Commerce, Trade and Commercial Law submitted revised drafts of the two acts, as well as a proposed treaty on the subject of international arbitration agreements.<sup>26</sup> During the Association's discussion of the Committee's recommendations, one member inquired about "what subjects [were] embraced in the matter of arbitration, as proposed by Mr. Piatt's committee."<sup>27</sup> William Piatt, who had just taken over as Chairman of

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19. *Id.*

20. *Id.* at 147.

21. 45 A.B.A. REP. 75 (1920).

22. 46 A.B.A. REP. 53 (1921).

23. *Id.*

24. *Id.* at 355–61.

25. IAN R. MACNEIL, AMERICAN ARBITRATION LAW 85 (1992).

26. 47 A.B.A. REP. 289 (1922).

27. *Id.* at 53.

the Committee,<sup>28</sup> responded that “[c]ommercial arbitration was the subject that the Committee . . . first took under consideration . . . three years ago.”<sup>29</sup> At this meeting, the acts were renamed the Uniform Act for Commercial Arbitration and the United States Arbitration Act, the name that would stick with the Act through its enactment.<sup>30</sup> Again, neither act contained an exemption for employment contracts.<sup>31</sup> Furthermore, the Committee’s report contained no mention of industrial or labor arbitration, though it did contain numerous references to commercial arbitration.<sup>32</sup>

The version the FAA approved at the ABA’s 1922 meeting was introduced in Congress on December 20, 1922, by Senator Sterling and Congressman Mills.<sup>33</sup> Once it had been introduced, the bill was referred to the Committee on the Judiciary in each branch. It was at the hearing before the Subcommittee of the Committee on the Judiciary for the Senate that the Section 1 exemption was first considered.<sup>34</sup>

Piatt, the chairman of the ABA’s Committee on Commerce, Trade and Commercial Law, testified at the Senate hearing.<sup>35</sup> In his testimony, Piatt raised the issue of arbitration of employment contracts:

[T]here is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official head, or whatever he is, of that part of the labor union that has to do with the ocean—the seamen. . . . He has objected to it, and criticized it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between stevedores and their employers. . . . [I]t was not the intention of the bill to have any such effect as that. *It was not the intention of this bill to make an industrial arbitration in any sense*; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, “but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.”<sup>36</sup>

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28. See *Sales and Contracts to Sell Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Comm. on the Judiciary*, 67th Cong. 7 (1923) [hereinafter *Sales and Contracts*].

29. 47 A.B.A. REP. 53.

30. See *id.* at 315–21.

31. See *id.*

32. See *id.* at 52–53.

33. 48 A.B.A. REP. 286 (1923).

34. See *Sales and Contracts*, *supra* note 28, at 9.

35. See *id.*

36. *Sales and Contracts*, *supra* note 28, at 9 (statement of William Piatt, Chairman, ABA Committee on Commerce, Trade and Commercial Law) (emphasis added).

Piatt went on to testify that “[i]t is not intended that this shall be an act referring to labor disputes, at all.”<sup>37</sup> As to the real purpose of the FAA, “[i]t is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that’s all there is in this.”<sup>38</sup> Although the bill never made it out of the committee that year, the language proposed by Piatt in the Senate hearing was the basis for the amendment to Section 1 that remained in all subsequent versions of the bill, including the one enacted into law in 1925.<sup>39</sup>

When the ABA met in 1923, the Committee on Commerce, Trade and Commercial Law reported that, “[o]wing to the lateness of the session and the pressure of other important business, the bill was not reported by the committees” during the last session.<sup>40</sup> The Committee went on to explain that they had drafted a new version of the Act, incorporating the changes to Section 1.<sup>41</sup> The amendment read, “but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>42</sup> This is the exact wording of Section 1, as it appears in the FAA today.<sup>43</sup>

Once the Section 1 exception had been added, the Act was introduced to Congress again, and this time a joint hearing was held by the Subcommittees on the Judiciary for the House and Senate.<sup>44</sup> Other than to state that there was widespread support for the bill and to note a complete lack of opposition to it, little was said in this hearing that is relevant to Section 1.<sup>45</sup> The amendment to the Section was not explicitly discussed at any time.<sup>46</sup>

The House issued a report on January 24, 1924, expressing approval for the bill and specifically mentioning the lack of opposition in the joint committee hearing.<sup>47</sup> On February 5, 1924, Representative Graham placed the bill on the Consent Calendar.<sup>48</sup> Although a vote on the bill was postponed until it came up through

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37. *Id.*

38. *Id.* The language proposed by Piatt at the Senate hearing was very similar, though not identical, to the language used to amend the Act.

39. *See* 9 U.S.C. § 1 (2000).

40. 48 A.B.A. REP. 287 (1923).

41. *Id.*

42. 48 A.B.A. REP. app. B at 302.

43. 9 U.S.C. § 1

44. *Arbitration of Interstate Commercial Disputes: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary, 68th Cong. 1 (1924) [hereinafter *Arbitration*].*

45. *Id.*

46. *See id.*

47. H.R. REP. NO. 96, at 2 (1924).

48. 65 CONG. REC. H646, 1931 (1924) (statement of Rep. Graham).

the course of the regular calendar, there was a brief discussion of the purpose and effect of the bill.<sup>49</sup> Graham explained that “[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts.”<sup>50</sup> When the bill came to the floor on the Consent Calendar again on June 6, 1924, Representative Mills explained that “[t]his bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract.”<sup>51</sup>

The bill did not appear before the Senate until December 30, 1924.<sup>52</sup> There, Senator Walsh described the bill as providing “for the abolition of the rule that agreements for arbitration will not be specifically enforced.”<sup>53</sup> He went on to explain that the old rule needed to be abolished because the nation’s business interests were frustrated with the delay associated with litigation.<sup>54</sup>

Ultimately, the bill was passed by both the House and the Senate, and President Coolidge signed the FAA into law on February 12, 1925.<sup>55</sup>

## II. The Originally Intended Scope of Section 1

### A. Textual Analysis

Given the Court’s preference for construing statutes according to the plain meaning of their text, an analysis of the language of the Section 1 exemption provides an appropriate starting place for determining the original meaning of the provision. The mention in Section 1 of “any other class of worker engaged in foreign or interstate commerce” invites an inquiry into the meaning of this language at the time it was included in the Act. Examining where the development of the Commerce Clause doctrine was during the 1920s allows for an accurate construction of the statute’s text and provides further evidence of the meaning that the drafters and enactors gave to the Section 1 exemption.

In *Circuit City*, the Supreme Court characterized the phrase “engaged in commerce” as a term of art expressing congressional intent to limit regulation to something less than their full authority

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49. *Id.*

50. *Id.*

51. *Id.* at 11080 (statement of Rep. Mills).

52. 66 CONG. REC. S1005, 984 (1924) (statement of Sen. Walsh).

53. *Id.*

54. *Id.*

55. Federal Arbitration Act, ch. 213, 43 Stat. 883-86 (1925).



under the Commerce Clause.<sup>56</sup> However, this characterization only reveals the modern conception of “engaged in commerce” as a term of art.<sup>57</sup> As the Court admits in *Circuit City*, the question of what the phrase meant in 1925 is left unanswered.<sup>58</sup> If, at the time it was included in the Section 1 exemption, “engaged in commerce” represented the full extent of Congress’s Commerce Clause power, this would further support the argument that the Act was originally intended to exclude employment contracts to the full extent possible.

At the start, it is important to recognize that the United States government is one of enumerated powers and that Congress can act only when it can point to specific authorization in the text of the Constitution.<sup>59</sup> In acting pursuant to its enumerated powers, Congress is further limited by what the Court has determined the breadth of such powers to be.<sup>60</sup> The early presumption was that Congress’s authority under the Commerce Clause was quite limited.<sup>61</sup>

In order to determine precisely what “engaged in commerce” connoted in 1925, it is helpful to review the Act’s contemporary case law. Two Supreme Court cases from the early 1900s involving the Federal Employers Liability Act (the “FELA”) demonstrate that when the FAA was enacted, the phrase “engaged in commerce” expressed what was then thought to be the outer limits of Congress’s power under the commerce clause.<sup>62</sup>

In the *Employers’ Liability Cases*, the Court found the FELA unconstitutional on the grounds that it exceeded Congress’s power to regulate under the commerce clause.<sup>63</sup> As originally enacted, the FELA covered “all common carriers engaged in interstate commerce, and impos[ed] . . . liability upon them in favor of any of their employe’s, without qualification or restriction as to the business in which the carriers or their employe’s may be engaged at the time of the injury.”<sup>64</sup> In other words, the FELA regulated individuals and corporations “because they engage[d] in interstate commerce,” as opposed to just regulating “the business of interstate commerce”

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56. *Circuit City*, 532 U.S. at 115–16.

57. See *Jones v. United States*, 529 U.S. 848, 855 (2000); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995); *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 279–80 (1975). The only cases cited by the Court in *Circuit City* come well after the relevant period of inquiry.

58. *Circuit City*, 532 U.S. at 116.

59. See *United States v. Lopez*, 514 U.S. 549, 552 (1995).

60. *Id.* at 552–56.

61. *Id.* at 552–55.

62. *Employers’ Liab. Cases*, 207 U.S. 463, 498 (1908); *Second Employers’ Liab. Cases*, 223 U.S. 1, 48–49 (1912).

63. 207 U.S. at 498.

64. *Id.*

itself.<sup>65</sup> The Court held that because the law included employees who may not have been actually engaged in commerce when they were injured, the Act “of necessity includes subjects wholly outside of the power of Congress to regulate commerce.”<sup>66</sup>

In explaining how the FELA regulated beyond interstate commerce, the Court used the example of a railroad company that shipped goods as part of interstate commerce.<sup>67</sup> The Court explained that, if the same company had a local branch that operated entirely within one state or had a local repair shop or warehouse, those activities would be beyond interstate commerce because they were separate from the company’s actual business of interstate commerce.<sup>68</sup> The explicit description of those employment activities the Court considered within the realm of interstate commerce and those they considered outside of that realm is consistent with a broad reading of the language that was used in the Section 1 exemption.

If, after the *Employers’ Liability Cases*, there was any doubt as to the scope of Congress’s power to regulate commerce, the *Second Employers’ Liability Cases* removed it. In the *Second Employers’ Liability Cases*, the Court upheld the FELA, as it had been amended.<sup>69</sup> In describing the permissible scope of congressional authority, the Court said that “Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroads and their employe’s, *while both are engaged in such commerce.*”<sup>70</sup> Again, this gave anyone drafting a piece of federal legislation covering employees a clear roadmap as to what Congress could regulate.

As these cases demonstrate, at the time of the FAA’s enactment, Congress’s power to regulate the terms and conditions of employment was thought to be limited to circumstances where employees were actually engaged in acts of commerce. Regulation of transportation workers like seamen and railroad employees was a prime example of what was thought to be an appropriate use of Commerce Clause power. Given this context, it is entirely plausible that, rather than expressing an intent to limit the exemption to transportation workers, seamen and railroad employees were listed as a means of clarifying that Congress was not attempting to exceed its Commerce Clause powers as they had recently been defined by the Court. Supporting this argument is the fact that the only direct evidence regarding the specific intent of the exemption explicitly

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65. *Id.* at 497.

66. *Id.* at 498.

67. *Id.*

68. *Id.*

69. 223 U.S. at 1.

70. *Id.* at 48–49 (emphasis added).

states that the intent of the Act was always to exclude labor disputes from its scope.<sup>71</sup> At no time did the drafters or enactors of the Act express any views to the contrary.

All told, the *Employers' Liability Cases* demonstrate that prior to the FAA's enactment, the phrase "engaged in commerce" was used to refer generally to Congress's full powers under the Commerce Clause. Indeed, it was not until 1937 that the Supreme Court began its radical departure from this view of Commerce Clause authority.<sup>72</sup> Given this, it is hardly surprising that the language of Section 1 conformed to current Supreme Court precedent and limited the exemption to "workers engaged in foreign or interstate commerce."

Although the Court in *Circuit City* expressed concern that construing the phrase "engaged in commerce" in the context in which it was used would contradict their earlier cases and "bring instability to statutory construction," these concerns do not appear to be well founded.<sup>73</sup> First, although the Court does not always construe terms according to their usage at a particular time, in some instances the Court has gone to great lengths to do precisely this.<sup>74</sup> In a case such as the present, where the meaning of the term in question varies greatly depending on the time it was used, it seems particularly appropriate to construe the term in its historical context in order to gain an accurate understanding of its meaning. Moreover, construing "engaged in commerce" in its original context for the purpose of interpreting the FAA will not lead to instability in statutory construction. Not only has the Court engaged in this type of

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71. *Sales and Contracts*, *supra* note 28, at 9.

72. The exact year depends on whether one views the turning point to be *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), or *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Laughlin Steel*, the Court abandoned the distinction between direct and indirect effects on interstate commerce in upholding the National Labor Relations Act. 301 U.S. at 36-38. However, some scholars believe that the real turning point came in *Wickard*, where the Court extended Congress' powers under the Commerce Clause to include even the most attenuated activities. 317 U.S. at 125. Indeed, in *Wickard*, the Court permitted regulation of wheat grown and harvested by a farmer for his personal consumption under the guise of Congress' powers under the Commerce Clause. *Id.* at 118.

73. 532 U.S. at 117.

74. *Compare* *FTC v. Bunte Bros, Inc.*, 312 U.S. 349, 351 n.2 (1941), *with* *Greenwich Collieries*, 512 U.S. 267, 272-76 (1994). In *Greenwich Collieries*, the Court devoted five pages of its opinion to defining the term "burden of proof" in the year the Administrative Procedure Act was enacted. *See* 512 U.S. at 272-76. As the Court explained, since the term was not defined in the text of the statute, their "task is to construe it in accord with its ordinary or natural meaning." *Id.* at 272. However, the Court recognized that "the meaning of words may change over time, and many words have several meanings even at a fixed point in time" and thus found it necessary to ascertain the "ordinary meaning" of the term in the year of the statute's enactment. *Id.* The Court went to great lengths to carry out this task, consulting a substantial body of contemporary case law, as well as numerous treatises. *See id.* at 272-76.

contextual statutory construction in the past, without creating instability, but the task of construing a term in a particular statute need only be done once. Once the Court determines the meaning of “engaged in commerce” as it was used in 1925, the scope of the Section 1 exemption will be a settled matter.

Construing Section 1’s reference to “engaged in commerce” in the context in which the FAA was enacted gives a precise and historically accurate meaning to the exemption’s text. As the Court’s past performance demonstrates, this is a task that the Court is qualified to undertake. Once this additional step is taken, the *Employers’ Liability Cases* make it clear that, as it was used in the Section 1 exemption, “engaged in commerce” refers to the outer limits of Congress’s power under the Commerce Clause and supports a broad reading of the scope of the exemption.

Despite the clear textual interpretation provided by the *Employers’ Liability Cases*, critics of the broad interpretation of Section 1 argue that the provision must still be read narrowly due to the specific reference to seamen and railroad employees in the exemption. For example, in *Circuit City*, the Court argues that, pursuant to the maxim of statutory construction, *ejusdem generis*, the specific mention of the two categories of employees indicates that the subsequent phrase, “any other class of workers engaged in interstate commerce,” refers to other classes of workers like the two explicitly mentioned.<sup>75</sup> Others argue that since the mention of seamen and railroad employees is superfluous if “any other class of workers engaged in interstate commerce” refers to Congress’s full powers under the Commerce Clause, the purpose of including the two specific categories must have been to limit the scope of the exemption.<sup>76</sup> However, these arguments are flawed due to their failure to consider the context in which the Act emerged.

First, reliance on the maxim of statutory construction, *ejusdem generis*, construes the statute in such a way that, by the second phrase, Congress is assumed to have been referring only to other types of workers engaged in transportation. However, this ignores the Commerce Clause background upon which the Act was constructed. Since the Court had recently made it clear that Congress could only regulate those employees actually engaged in interstate commerce, the first clause seems to indicate Congress’s attempt to regulate employees who were indisputably within those limits. On the other hand, the second clause of the exemption seems instead to be an

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75. 532 U.S. at 114–15.

76. William F. Kolakowski III, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171, 2180–81 (1995).

attempt to include every other type of employee who was engaged in interstate commerce—and thus subject to congressional regulation under the Act.

Next, reliance on another maxim of statutory construction, that laws should be read to avoid being superfluous, should not be taken as conclusive either. If there is an obvious explanation of why the legislature included a superfluous provision, the intent of the legislature controls over other general principles of statutory construction. As the history of the exemption reveals, the concerns raised by particular groups of transportation workers provided Congress with ample motivation to mention certain classes of workers specifically.<sup>77</sup>

Considering the fact that, at the time the FAA was enacted, congressional authority to regulate commerce was defined by whether a party was actually engaged in commerce, it is to be expected that the Section 1 exception was framed in terms of those “engaged in foreign or interstate commerce.” Moreover, considering the history of the exemption’s enactment, it is not surprising that specific mention was made of railroad and seamen. Instead, when the Act is placed in its original context, a broad reading of the text of the exemption is the only one that makes sense.

## **B. Legislative History**

In addition to the textual arguments in support of a broad reading of the Section 1 exemption, the legislative history of the FAA provides further support for such a construction. Although the Bill was not discussed extensively on the floor of Congress, the ABA Reports, when taken together with the debate that did take place in Congress, provide a clear picture of the intended purpose of the Act—to provide for enforceable arbitration clauses in commercial contracts. Contrary to its modern interpretation, Section 1 was intended to be construed broadly to exempt employment contracts from the scope of mandatory arbitration.

### *(1) The Purpose of the FAA*

It was apparent from the start that the ABA was concerned with drafting a piece of commercial legislation to help merchants deal with their disputes in a timely and effective manner. This remained the focus of the Act throughout its numerous drafts.<sup>78</sup> This is first apparent from the fact that the ABA referred the matter to its

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77. See *Sales and Contracts*, *supra* note 28, at 9 (statement of William Piatt, Chairman, ABA Committee on Commerce, Trade and Commercial Law).

78. Indeed, the FAA was interpreted this way until 1956. See *Lincoln Mills of Ala. v. Textile Workers Union*, 230 F.2d 81, 86 (5th Cir. 1956).

Committee on Commerce, Trade and Commercial Law, not to a committee on labor issues.<sup>79</sup>

Moreover, in the initial resolution referring the matter to a committee, the issue was framed as “the further extension of the principle of *commercial* arbitration.”<sup>80</sup> There is not a single mention of the arbitration of industrial, labor, or employment disputes in the ABA Reports from 1920 to 1923.<sup>81</sup> Nor was there such a mention in the Congressional hearings and debate on the various versions of the FAA, except to say explicitly that “[i]t was *not* the intention of this bill to make an industrial arbitration in any sense.”<sup>82</sup> That this statement was made by the Chairman of the ABA’s Committee on Commerce, Trade and Commercial Law to the Senate Committee on the Judiciary shows that both the ABA and Congress based their support of the FAA on the same information.

Indeed, when the Section 1 exemption was proposed before the Senate Committee on the Judiciary, Piatt made it extremely clear that the purpose of adding the amendment was to clarify that the intent of the FAA was to make arbitration an effective tool for resolving commercial disputes.<sup>83</sup> If the Senators objected to limiting the FAA in this manner, surely they would not have included the exemption in the final version of the act, particularly without stating that the exemption was intended to apply only to employees actually engaged in transportation.

When the bill came up for vote before the Senate, it was not described as applying specifically to commercial and admiralty contracts, as it had been in the House.<sup>84</sup> However, Senator Walsh did explain that the reason the bill was needed was to meet the nation’s *business* interests.<sup>85</sup> Again, there was no mention of its application to labor, employment, or industrial disputes.<sup>86</sup>

While the debate on the Senate floor is less explicit about the FAA was covering only commercial arbitration, it is significant that the most explicit discussion of the exclusion of industrial arbitration took place before the Senate Committee on the Judiciary. It was here that Piatt testified that “[i]t is not intended that this shall be an act referring to labor disputes at all.”<sup>87</sup> Rather, he explained, it was

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79. See 45 A.B.A. REP. 75 (1920).

80. *Id.* (emphasis added).

81. See generally *id.*; 46 A.B.A. REP. 52–54 (1921); 47 A.B.A. REP. 52–53 (1922); 48 A.B.A. REP. 52–60 (1923).

82. *Sales and Contracts*, *supra* note 28, at 9 (emphasis added).

83. See *id.*

84. Compare 65 CONG. REC. 11,080 (1924) with 66 CONG. REC. 984 (1924).

85. 66 CONG. REC. 984 (1924).

86. *Id.*

87. *Sales and Contracts*, *supra* note 28, at 9.

intended to give merchants the ability to use enforceable arbitration clauses in their business dealings.<sup>88</sup> No opposition to this idea was expressed either in the Committee or before the Senate as a whole.<sup>89</sup>

Despite the fact that there was limited discussion of the FAA on the floor of Congress, the ABA Reports, congressional hearing reports, and the Congressional Record contain sufficient information to indicate that both the drafters and the enactors of the FAA thought that they were passing a law about arbitration of commercial disputes. If Congress or the ABA actually did intend to include employment contracts within the scope of the FAA, surely someone, at some time during the four years the FAA was being drafted, would have mentioned that the FAA was not limited only to commercial arbitration, as was emphasized time and time again.

(2) *The Motivation for the Section 1 Exemption*

Beyond the evidence that the FAA was not intended to govern arbitration of employment contracts, the legislative history of the FAA provides a clear explanation for the addition of the Section 1 exemption. As stated earlier, the Section 1 exemption was added to the FAA as a direct result of Piatt voicing the concerns expressed by the Seamen's Union.<sup>90</sup> As Piatt explained, the head of the Seamen's Union was concerned that the Act would "compel[] arbitration . . . between the stevedores and their employers."<sup>91</sup> In light of the fact that Piatt brought it to the attention of the Judiciary Committee that the head of the Seamen's Union was concerned that the Act would "compel[] arbitration . . . between the stevedores and their employers," it was quite logical for Congress to mention specifically the employees represented by the union in the exemption in an effort to placate the union.<sup>92</sup> To strengthen the inference that seamen and railroad employees were mentioned in direct response to the concerns of the seamen's union, one needs only to look as far as the union's annual convention. The president of the International Seamen's Union discussed the FAA at their 1923 convention, stating that:

This bill provides for the reintroduction of forced or involuntary labor, if the freeman through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be

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88. *Id.*

89. *Id.*; 66 CONG. REC. 984 (1924).

90. *Sales and Contracts*, *supra* note 28, at 9.

91. *Id.*

92. *Id.*; see 9 U.S.C.A. § 1 (1999) ("[N]othing herein contained shall apply to contracts of employment of seamen. . .").

but few that will be able to resist. The personal hunger of the *seaman*, and the hunger of the wife and children of the *railroad man* will surely tempt them to sign, and so with sundry *other workers in "Interstate and Foreign Commerce."*<sup>93</sup>

As this shows, the language used in the Section 1 exemption is almost a direct quote from the leader of the Seamen's Union.

Given the direct correlation between the language in the union president's speech and the language adopted in the FAA, there is little doubt that the union's concerns motivated the wording of the exemption. Moreover, since there had been virtually unanimous support for the bill up until the International Seamen's Union expressed its concerns, there was motivation for the proponents of the FAA to add the exemption, as Piatt suggested, to preserve the lack of controversy regarding the bill.

As the history of the FAA illustrates, the Section 1 exemption was added in direct response to the concerns of the Seamen's Union and was not intended to apply to arbitration of industrial or labor contracts. To ignore the significant history behind the exemption when interpreting the statute is to give false meaning to its intent.

### C. Section 1 in the Public Eye

To understand the original meaning of the Section 1 exemption further, it is helpful to consider how the exemption was perceived by legal scholars at the time. A survey of law review articles published in the wake of the FAA's enactment corroborates much of what was found in the ABA Reports and Congressional Record, namely that the FAA was not intended to include arbitration of employment contracts.

The unwavering sentiment of legal scholars at the time the FAA was passed was that the FAA provided for enforceable commercial arbitration as a response to the business community's dissatisfaction with the existing arbitration law. Indeed, the *American Bar Association Journal* reported that "[n]o piece of commercial legislation . . . has been passed by Congress in a quarter of a century comparable in value to this."<sup>94</sup>

One 1926 article on the recently passed law did state that "[t]he scope of the Federal act and its potential usefulness are too little known."<sup>95</sup> While this could be used to argue that the FAA's scope was not seen as obviously limited to commercial arbitration, the

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93. *Proceedings of the 26th Annual Convention of the International Seamen's Union of America* 203-04 (1923) [hereinafter *Int'l Seamen's Union*] (emphasis added).

94. *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 153 (1925).

95. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926).



article went on to say that the scope of the FAA “must be read in the light of the situation which it was devised to correct and of the history of arbitration and of similar statutes in the recent past.”<sup>96</sup> As stated elsewhere in the same article, arbitration was historically used to settle business disputes, although agreements to arbitrate were not legally binding.<sup>97</sup> The authors went on to state that the new federal law was “the direct outcome of this experience of American business and of the necessity for some remedy which will cut the Gordian knot of the law’s delay.”<sup>98</sup> This only reinforces the notion that the FAA was about addressing the business community’s need to resolve their commercial disputes in a timely manner.

Another journal described the FAA as “the outgrowth of a movement of growing momentum.”<sup>99</sup> Specifically, “[b]usiness men generally had come to dislike and distrust the expense and result of litigation arising out of business disputes.”<sup>100</sup> In discussing whether there was support for the FAA, the article mentioned only that it “had the growing support of the business world, as well as the official support of important legal organizations.”<sup>101</sup> If the perception was that the FAA applied to arbitration of employment contracts, it would seem logical for the author also to mention whether the FAA had the support of labor organizations. Yet, as in the ABA Reports and Congressional Record, no labor organizations were mentioned.<sup>102</sup>

Similarly, during the 1924 joint hearing before the Subcommittees of the Committees on the Judiciary, the Chairman read into the record all of the letters that were received about the bill.<sup>103</sup> This included letters from the Secretary of Commerce and numerous business groups and chambers of commerce.<sup>104</sup> In addition, Charles Bernheimer, a representative from the New York Chamber of Commerce, submitted a list of organizations that had come out in support of the FAA.<sup>105</sup> Among all the organizations writing in about the FAA, there was not one union or labor organization.<sup>106</sup> Indeed, the only mention in the ABA Reports and the Congressional Record of a union comment on the FAA was that of the International Seamen’s Union.

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96. *Id.*

97. *Id.*

98. *Id.*

99. Note, *Effect of the United States Arbitration Act*, 25 GEO. L.J. 443, 445–46 (1937).

100. *Id.*

101. *Id.* at 445–46.

102. Except, of course, the International Seamen’s Union, whose concerns spawned the exception.

103. *Arbitration*, *supra* note 44, at 19–24.

104. *Id.*

105. *Id.* at 21–22.

106. *Id.* at 19–24.

Although the International Seamen's Union was the only union mentioned in the official reports, there is evidence that other labor organizations, such as the American Federation of Labor, opposed the bill as it was originally drafted.<sup>107</sup> Like the International Seamen's Union, the American Federation of Labor was concerned that the FAA would be applied to labor disputes.<sup>108</sup> After the FAA was amended, the Executive Council of the American Federation of Labor stated, "[P]rotests from the American Federation of Labor and the International Seamen's Union brought an amendment . . . [that] exempted labor from the provisions of the law, although its sponsors denied there was any intention to include labor disputes."<sup>109</sup>

This comment from the American Federation of Labor demonstrates that, to the extent that labor organizations did comment on the FAA, it was to express their disapproval of subjecting employment contracts to mandatory arbitration. Since the comment was made after the FAA was enacted, it also shows that the American Federation of Labor understood Section 1 to exempt employment contracts explicitly from the scope of the law.

### **III. Remediating the Modern Misconception of Section 1**

By settling on a narrow interpretation of the FAA's Section 1 exemption, this Note argues that the Supreme Court has ignored the history of the FAA and the evolution of arbitration in the United States. In doing so, the Court has settled on a reading of the exemption that is inconsistent with its original meaning and the Court has not provided an adequate justification for this departure. The author recognizes that the Supreme Court is highly unlikely to reverse its current reading of the Section 1 exemption to bring it in line with the original intent of the FAA. In the absence of such a reversal, it is up to Congress to remedy the conflict between the FAA's original meaning and its current construction.

Congress should recognize that, when the FAA was enacted, mandatory arbitration was seen simply as a way to provide for commercial arbitration and address some of the problems facing the nation's business community. If Congress finds mandatory arbitration of employment contracts to be a good policy today, which is questionable given the lack of protection it offers employees, Congress should amend the Act to exclude only those employees engaged in transportation. If, on the other hand, Congress recognizes

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107. *Circuit City*, 532 U.S. 105, 127–28 n.8 (2001) (citing *Proceedings of the 45th Annual Convention of the American Federation of Labor* 52 (1925)).

108. *See id.*

109. *Id.*

the wisdom that the International Seamen's Union had in 1923, it will realize that not only does subjecting employment contracts to mandatory arbitration violate the original intent of the FAA, but it places workers at a significant disadvantage.<sup>110</sup>

Mandatory arbitration poses a number of serious problems for employees. In addition to leaving employees with little control over the decision of whether or not to submit to arbitration, forcing workers into arbitration leaves them without the superior protections of the courts.<sup>111</sup> Due to this lack of judicial protection, "the potential to exploit bargaining power or abuse the process is ripe."<sup>112</sup> In addition, in many instances arbitration provides employees with inadequate remedies for their workplace disputes.<sup>113</sup> The criticisms of arbitration, particularly mandatory arbitration, are mounting, and there is a growing consensus that it does not adequately protect the interests of employees.<sup>114</sup>

As the president of the Seamen's Union was aware, workers do not have the same leverage in negotiating contracts with their employers as do merchants negotiating contracts among themselves. This results in a situation where, as we have seen, employees are increasingly left with little choice but to enter into contracts providing for mandatory arbitration of ensuing disputes. For these reasons, the author proposes that Congress amend the FAA to reflect its intended purpose of excluding employment contracts from mandatory arbitration.

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110. See *Int'l Seamen's Union*, *supra* note 93 at 203–04.

111. Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 604 (2001). As Weston explains, "[b]ecause ADR lacks the procedural protections of a judicial forum, such as rights to a jury trial, discovery, appeal, and judicial remedies for abusive conduct, the possibilities for unfairness cannot be overlooked." *Id.*

112. *Id.*

113. See Sarah Johnston, *Alternative Dispute Resolution Symposium: Current Public Law and Policy Issues in ADR: ADR in the Employment Discrimination Context: Friend or Foe to Claimants*, 22 HAMLINE J. PUB. L. & POL'Y 335, 374 (2001) (arguing that arbitration provides inadequate remedies to employees who have been discriminated against in violation of Title VII).

114. See Eric A. Hernandez, Note, *Mandatory Arbitration and Employment Discrimination: The Unfair Law*, 2 CARDOZO J. CONFLICT RESOL. 96, 101 (2001), available at <http://www.cardozojcr.com/vol2no1/notes02.html>. The author notes that "[t]he EEOC, members of Congress and the commissioner of the Securities and Exchange Commission ('SEC') have all publicly criticized mandatory arbitration." *Id.* See also Johnston, *supra* note 113; Weston, *supra* note 111.

### Conclusion

This Note has read the text of the Section 1 exemption in the context in which it arose and considered the meaning that was given to the text by the then-prevailing view of Congress's Commerce Clause powers. Moreover, this Note has explored the history of the Section 1 exemption by examining the record left by the drafters and enactors of the FAA. This Note has also examined how legal scholars and the general public viewed the FAA upon its passage. Each piece of history indicates that, as it was originally conceived, Section 1 excluded employment contracts from mandatory arbitration to the full extent allowed by the Commerce Clause. Together, this creates a strong case for the broad interpretation of the exemption.

By “[p]laying ostrich” to the rich history behind the FAA’s Section 1 exemption, the Supreme Court has essentially rewritten the FAA.<sup>115</sup> Rather than giving the Section 1 exemption its logical meaning, the Court has ignored explicit evidence that the FAA was not intended to apply to employment contracts and has found instead that the FAA embraces arbitration of such contracts. Due to the ever-increasing presence of mandatory arbitration clauses in employment contracts, the time has come for Congress to remedy the situation by amending the FAA to clarify the law’s exemption of employment contracts.

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115. *Circuit City*, 532 U.S. at 128 (Stevens, J., dissenting).

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